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**PATENT APPLICATION**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of

Brendon LILLY

Group Art Unit: 2857

Application No.: 10/501,945

Examiner: P. Kim

Filed: October 12, 2004

Docket No.: 120496

For: PERFORMANCE MONITORING SYSTEM AND METHOD

**REQUEST FOR RECONSIDERATION**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

In reply to the December 23, 2004 Office Action, reconsideration of the application is respectfully requested. Applicant gratefully acknowledges the indication that claims 6 and 7 contain allowable subject matter.

The Office Action rejects claims 9 and 10 under 35 U.S.C. §112, second paragraph, asserting that the claims are indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. This rejection is respectfully traversed.

Although the Examiner's rejection regarding the use of the term "mixture" is noted, it is submitted that the person skilled in the art would understand that, in the context of the invention described in the specification, at page 8, paragraph 5 to page 9, paragraph 1, "mixture" does not, and cannot, refer to, or be confused with, a combination of matter in which the constituents retain their own properties, but refers to a combination of mathematical distributions. Applicant respectfully submits that changing the word "mixture" to another word, i.e. "combination," would not further clarify the claim and would possibly increase uncertainty as being inconsistent with the language of the specification and possibly

create unnecessary estoppels as to equivalents when one of ordinary skill in the art would not likely be confused by the claim and specification as written.

In view of the foregoing, Applicant respectfully submits that claims 9 and 10 fully comply with 35 U.S.C. §112, second paragraph. Accordingly, withdrawal of the rejection is respectfully requested.

The Office Action rejects claims 1-5 and 8-15 under 35 U.S.C. §102(b) over U.S. Patent Application Publication No. 2002/0116156 to Remboski et al. ("Remboski"). This rejection is respectfully traversed.

Independent claim 1 recites, *inter alia*, a method for monitoring performance of at least one machine operator, comprising generating "at least one performance indicator distribution" and calculating at least one performance indicator "from the at least one performance indicator distribution." Remboski does not disclose, teach or suggest either of these features.

Remboski only discloses, at paragraphs [0062] – [0066] and Fig. 4, a series of steps 402-410, for assessing vehicle operator performance, where step 410 infers driver performance by using an inference engine, a rules-based decision engine, fuzzy logic, or adaptive, goal seeking. Nowhere does Remboski disclose, teach or suggest, generating at least one performance indicator distribution from the measurements and calculating at least one performance indicator from the at least one performance indicator distribution, as recited in independent claim 1. Accordingly, since Remboski does not disclose, teach or suggest each and every feature recited in claim 1, the rejection of claim 1 under 35 U.S.C. §102(b) is improper, and it is respectfully submitted that claim 1 is patentable over Remboski.

Claims 2-5 and 8-15 depend from independent claim 1 and are likewise patentable over Remboski at least for their dependence on an allowable base claim, as well as for

additional features they recite. Withdrawal of the rejection over Remboski is respectfully requested.

The Office Action rejects claim 12 under 35 U.S.C. §103(a) over Remboski in view of U.S. Patent No. 6,134,541 to Castelli et al. ("Castelli") and claim 13 under 35 U.S.C. §103(a) over Remboski in view of U.S. Patent No. 6,137,909 to Greineder et al. ("Greineder"). These rejections are respectfully traversed.

As argued above, Remboski fails to disclose a method for monitoring performance of at least one machine operator, comprising generating "at least one performance indicator distribution from the measurements and calculating at least one performance indicator from the at least one performance indicator distribution," as recited in claim 1. Similarly, neither Castelli nor Greineder discloses, teaches or suggests these features.

Accordingly, Applicant respectfully submits that the applied art fails to disclose the generation of, and the use of, performance indicator distributions, as recited in claim 1. Claims 12 and 13 depend from independent claim 1 and are likewise patentable over the applied art at least for their dependence on an allowable base claim, as well as for additional features they recites. Withdrawal of these rejections over Remboski in view of Castelli or Greineder is respectfully requested.

The Office Action rejects claims 16-25 under 35 U.S.C. §103(a) over Remboski in view of U.S. Patent No. 6,795,799 to Deb et al. ("Deb"). The Office Action asserts that Remboski disclose all the features of claim 16 except for deficiencies, which are allegedly made up by Deb. Applicant respectfully disagrees.

Independent claim 16 is a system claim comprising a server performing the method recited in claim 1. In failing to disclose all the features recited in claim 1, as discussed above, Remboski similarly fails to disclose a server performing this method, as recited in claim 16. Similarly, the remote diagnostic server of Deb fails to disclose generating at least one

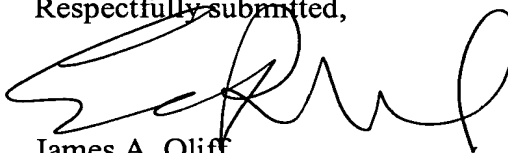
performance indicator distribution and calculating at least one performance indicator from the at least one performance indicator distribution. Therefore, Applicant respectfully submits that the applied art fails to disclose, teach or suggest all the features as recited in claim 16.

Claims 17-25 depend from independent claim 16 and are likewise patentable over Remboski in view of Deb at least for their dependence on an allowable base claim, as well as for additional features they recite. Withdrawal of the rejection over Remboski in view of Deb is respectfully requested.

In view of the foregoing, it is respectfully submitted that this application is in condition for allowance. Favorable reconsideration and prompt allowance of claims 1-25 are earnestly solicited.

Should the Examiner believe that anything further would be desirable in order to place this application in even better condition for allowance, the Examiner is invited to contact the undersigned at the telephone number set forth below.

Respectfully submitted,



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JAO:ERM/aaw

Date: March 22, 2005

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